No. 17-654

IN THE

Supreme Court of the United States

ERIC HARGAN, *et al.*,

Petitioners,

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

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QUESTION PRESENTED

Whether this Court should review a court of appeals' fact-bound decision denying an emergency stay pending appeal for the sole purpose of vacating the decision, where the decision did not resolve any merits question raised by respondent's complaint, and where the petitioners may seek this Court's review of any future merits determinations.

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INTRODUCTION

Jane Doe is a 17-year-old who came to this country without her parents.[1] She was apprehended by the U.S. government and has been detained since September 2017 in a shelter run by a federal government grantee. After receiving a medical examination and being informed she was pregnant, Ms. Doe told shelter staff that she wanted an abortion. With the help of two court-appointed representatives, she received permission from a Texas state court to bypass the State's parental consent law and to consent to the abortion herself. She then sought to attend state-mandated pre-abortion counseling at a local clinic. Pursuant to a policy adopted in March 2017 by the Director of the Office of Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services (HHS)—and in stark contrast to the policies of U.S. Immigration and Customs Enforcement (ICE) and the Bureau of Prisons (BOP)—the government refused to allow Ms. Doe to attend any abortion-related appointments.

Ms. Doe brought suit in federal district court seeking to enforce her right to an abortion, consistent with the Constitution and the state court's order. The government did not contest Ms. Doe's claim that she has a constitutional right to an abortion. Nor did it argue that allowing her to attend the appointments would violate statutory restrictions on the use of federal funds or any federal regulations. Instead, it argued that it should not have to "facilitate" her access to an abortion—even if it did not pay for, or transport Ms. Doe to, any appointments. Because she was in federal custody, this policy prevented Ms. Doe from

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[1] Respondent Garza is Ms. Doe's guardian ad litem.

exercising what the government did not contest is her constitutional right.

On October 18, 2017, the district court issued a temporary restraining order (TRO) that, among other things, directed the defendants to allow Ms. Doe to attend the necessary appointments. The same day, the government sought an emergency stay pending appeal, which a panel of the D.C. Circuit granted in part on October 20. On October 24, however, the D.C. Circuit *en banc* granted rehearing and denied the government's emergency request for a stay. This time, the government did not seek an immediate stay, even though nothing precluded it from doing so. On the next day, October 25, one month after the state court authorized Ms. Doe to obtain an abortion, she finally had the procedure.

Having failed to seek an emergency stay from this Court on October 24, as it had from the D.C. Circuit on the day the district court granted the TRO, the government filed this petition nine days *after* the events that it claims have rendered the issues in this case moot. The government does not seek review of the single legal issue decided by the court of appeals—whether the government's application for a stay pending appeal met the standards for obtaining such relief. Rather, it asks this Court to vacate that emergency, interlocutory ruling on the ground that some of Ms. Doe's claims for relief have been mooted by her abortion. The government then suggests that this Court should decide, in the first instance, that claims Ms. Doe seeks to bring on behalf of herself and a class are likewise moot and dismiss those claims now while they remain pending in district court. Simultaneously, the government suggests that this Court should consider issuing an order to show cause

why disciplinary action should not be taken against respondent's counsel "in light of the extraordinary circumstances of this case." Pet. 26.

But it is the government's petition that is extraordinary: The government asks this Court to grant certiorari without identifying any question worthy of review; it seeks vacatur under circumstances that the government has repeatedly argued do not warrant this Court's intervention; it asks this Court to direct dismissal of an array of claims not implicated by the decision below before any lower court has passed on them; and it suggests that this Court consider disciplinary action against lawyers for faithfully fulfilling their ethical duties to their client.

The petition should be denied for at least three reasons. First, as the government acknowledges, even where a case has become moot, the Court should not grant review for purposes of vacating a lower court's decision unless the petition independently presents an issue that would have been worthy of review prior to becoming moot. Yet the government identifies no such issue. The only question decided below was whether the government had met the requirements for a stay of a TRO pending appeal. That narrow, fact-bound issue, as to which the court of appeals applied the legal standard urged by both sides, is not remotely worthy of this Court's review. No other issues are presented because the court below did not decide any.

Second, even if the decision below presented an issue worthy of this Court's review, the relief the government seeks would not be warranted. The government's argument that this Court should vacate the decision below and direct the dismissal of all claims for prospective relief regarding pregnant

unaccompanied minors on the grounds that they are moot is erroneous. The claims in this case regarding the treatment of pregnant minors are currently being litigated in the district court, and finding that they are moot would contravene this Court's decisions recognizing exceptions to mootness in cases like this one where the factual basis for the claim is of a fleeting nature.

Third, vacatur is intended to protect parties who are prevented from appealing and who would be harmed by the binding effects of the mooted ruling on future litigation. In this case, however, and consistent with established law, the D.C. Circuit's interlocutory decision denying a stay has no preclusive effect on future litigation. Moreover, the government failed to take the steps necessary to preserve its appellate rights, and in all events retains a full opportunity to seek review of the future litigation following final judgment on those claims.

Finally, the government's suggestion that this Court should consider issuing an order to show cause why respondent's counsel should not be disciplined provides no basis to find that counsel's conduct presents grounds for concern, much less sanction. The petition does not present legal or factual grounds for its suggestion that respondent's counsel may have violated any applicable rule of professional conduct. To the contrary, the government's recitation of events shows that it failed to seek a stay from this Court in a timely manner based on assumptions it made about the timing of Ms. Doe's procedure, not on the basis of any commitments from Ms. Doe's lawyers.

COUNTERSTATEMENT OF THE CASE

A. Facts

In early September 2017, Jane Doe, a young woman of 17, entered the United States without her parents. She was apprehended by U.S. authorities and placed in HHS custody in a shelter run by a federal government grantee in Texas. Through ORR, HHS exercises its responsibility for the "care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate." 8 U.S.C. § 1232(b)(1). A nationwide consent decree requires ORR and its shelters to provide "appropriate routine medical . . . care, family planning services, and emergency health care services." Stipulated Settlement Agreement, Ex. 1 at 1, *Flores* v. *Reno*, No. CV-85-4544 (C.D. Cal. Jan. 17, 1997).

On March 4, 2017, the Acting Director of ORR issued a letter informing grantees of its policy of "prohibit[ing] [shelters] from taking any action that facilitates an abortion without direction and approval from the Director of ORR," D.D.C. Dkt. No. 3-5, a policy that effectively gives the ORR Director veto power over a young woman's abortion decision.

Once in HHS custody, Ms. Doe was given a medical examination and told that she was pregnant. 10/17/2017 White Decl. ¶ 7. She informed her custodians that she wished to terminate the pregnancy. *Id.* ¶ 8. ORR directed the shelter to inform Ms. Doe's mother of her pregnancy over Ms. Doe's objection. Appellee's Opp. to Mot. for Stay Pending Appeal 7 (Oct. 19, 2017). The government also required Ms. Doe to attend a counseling session at an anti-abortion center. 10/13/2017 Amiri Decl. ¶ 2; 10/11/2017 Doe Decl. ¶ 13.

To obtain an abortion under Texas law, a minor must obtain parental consent or a court order finding that she "is mature and sufficiently well informed to make the decision" on her own, or that "the notification and attempt to obtain consent would not be in the best interest of the minor." Tex. Fam. Code Ann. § 33.003(i)(1)–(2). A state court appointed a guardian ad litem and an attorney ad litem for Ms. Doe and, with their assistance, she received a court order on September 25 granting her authority to consent to an abortion without the knowledge or consent of her parents or legal guardian. Pet. App. 69a.

Under Texas law, Ms. Doe first had to attend counseling at least 24 hours in advance of the abortion with the physician who would perform the procedure. Pet. App. 70a. When Ms. Doe requested permission to attend that counseling on September 27, ORR refused. 10/17/2017 White Decl. ¶ 10.[2]

ORR took this position notwithstanding contrary ICE and BOP policies that allow detained women to obtain abortions, and despite the government's position in this case that Ms. Doe would have been free to have an abortion if ORR placed her with a sponsor, see Appellants' Emergency Mot. for Stay Pending Appeal 11 (Oct. 18, 2017).

B. Procedural History

On October 13, 2017, Ms. Doe's guardian ad litem filed suit in the U.S. District Court for the District of Columbia against the Acting Secretary of HHS and

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[2] In response, Ms. Doe filed a lawsuit in Texas state court on October 5, alleging state-law neglect by the shelter. That case is sealed and has been removed to federal court. Appellee's Opp. to Mot. for Stay Pending Appeal 10 n.6 (Oct. 19, 2017).

other department officials on behalf of Ms. Doe and a putative class of "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit," Compl. ¶ 47. The complaint alleges, among other things, that the defendants violated the Constitution by "obstructing, interfering with, or blocking [the minors'] access to abortion" and by revealing "information about [the minors'] pregnancy and abortions to their parents or other family members, including immigration sponsors." *Id.* ¶¶ 55–56. Respondent simultaneously sought a TRO to prevent the government "from obstructing [Ms. Doe's] access to abortion." *Id.* at 15. On October 18, respondent moved for class certification.

The district court granted a TRO later on October 18, requiring defendants either to transport Ms. Doe or to allow her to be transported "to the abortion provider closest to [the] shelter in order to obtain the counseling required by state law on October 19, 2017, and to obtain the abortion procedure on October 20, 2017 and/or October 21, 2017, as dictated by the abortion providers' availability and any medical requirements." Pet App. 73a. It also temporarily restrained the defendants from "further forcing [Ms. Doe] to reveal her abortion decision to anyone, or revealing it to anyone themselves" or from retaliating against her or the shelter. *Id.* at 74a. Within five hours that same day, the government not only filed a notice of appeal in the D.C. Circuit, but also an emergency motion for a stay pending appeal, and a request for a temporary administrative stay while the court considered the stay pending appeal. Pet. 8.

On October 19, a panel of the D.C. Circuit administratively stayed the TRO to the extent it

pertained to Ms. Doe's transportation to obtain an abortion on October 20 or 21. Order (Oct. 19, 2017). The court did not stay other parts of the TRO, including the portion relating to the counseling appointment on October 19. *Id.* Ms. Doe received state-mandated counseling on October 19. Pet. 11.

Following oral argument, the panel issued a per curiam decision on October 20 in which it vacated the portion of the TRO that required the defendants to transport Ms. Doe to either counseling or an abortion. The panel noted that the government "has assumed, for purposes of this case, that [Ms. Doe] . . . possesses a constitutional right to obtain an abortion in the United States." Pet. App. 2a–3a. The panel found that releasing Ms. Doe to a sponsor, which the government stated it was attempting to do, "does not unduly burden the minor's right under Supreme Court precedent to an abortion . . . . *so long as* the process of securing a sponsor to whom the minor is released occurs expeditiously." *Id.* at 2a (emphasis added). The court therefore remanded to the district court with instructions to allow HHS eleven more days—until 5:00 p.m. on October 31—to secure a sponsor and release Ms. Doe. If no sponsor was approved in that time, the order provided that Ms. Doe could seek a new TRO "or other appropriate order," which the government "may . . . immediately appeal." *Id.*

Judge Millett dissented. She pointed out that there was no "factual basis to think that remand will accomplish anything but a forced continuation" of Ms. Doe's pregnancy, given the government's failure to identify a sponsor after six weeks. Pet App. 13a. Judge Millett observed, moreover, that the vetting process for sponsors was "understandably rigorous" and controlled by HHS. *Id.* On the other side of the

balance, Judge Millett wrote, "[e]very day that goes by is another day that the federal government forces [Ms. Doe] to carry an unwanted pregnancy forward. Days also increase the health risks associated with an abortion procedure . . . . [I]f [she] is 17 or 18 weeks along by the time this issue is resolved, the doctors at the South Texas clinic nearest to her (assuming it still has availability) will likely no longer be willing to perform the procedure." *Id.* at 14a.

On Sunday, October 22, Ms. Doe's guardian ad litem filed an emergency petition for rehearing *en banc* in the D.C. Circuit. Shortly before 2 p.m. Central Time[3] on October 24, the D.C. Circuit *en banc* granted the petition for rehearing and denied the government's motion for a stay pending appeal. The court concluded that the government had "not met the stringent requirements for a stay pending appeal, substantially for the reasons" set forth in Judge Millett's dissent from the panel decision. Pet. App. 19a (citation omitted). At this point in time, the government could have immediately sought a stay from this Court,[4] just as it had immediately sought a stay from the court of appeals when the district court entered the TRO. But it chose not to.

Following the D.C. Circuit's decision, Ms. Doe's guardian ad litem filed an emergency motion to amend the TRO in the district court. Pet. 10. The district court granted the motion shortly after 4 p.m. on October 24 and issued an amended TRO that required the defendants to transport Ms. Doe, or allow her to be transported, "promptly and without delay, on such

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[3] All times listed in this brief reflect Central Time.

[4] *See* Sup. Ct. R. 23.

dates, including today, and to such Texas abortion provider as shall be specified by [Ms. Doe's] guardian ad litem or attorney ad litem, in order to obtain the counseling required by state law and to obtain the abortion procedure, in accordance with the abortion providers' availability and any medical requirements." Pet. App. 66a. Again, the government could have sought a stay from this Court at this point, but did not.

C. Post-TRO Events

Upon receiving the amended TRO at about 4:15 p.m., Ms. Doe's guardian ad litem emailed shelter and Department of Justice (DOJ) personnel requesting that they transport Ms. Doe to the clinic. Pet'rs' Ex. B.[5] Despite the court order, the shelter responded that it would have to wait for ORR instructions. Pet'rs' Ex. M at 7. In response, Ms. Doe's attorney attached the court's order and advised the shelter that she would initiate contempt proceedings if the government defied the order. Pet'rs' Ex. C.

Soon thereafter, a DOJ attorney called Ms. Doe's attorney to inform her that the shelter was transporting Ms. Doe. The DOJ attorney explained that the shelter needed advance notice "of the timing of any appointments," Pet. 13. At 5:26 p.m., government counsel emailed Ms. Doe's attorney to thank her for speaking earlier and "to confirm [the attorney's] understanding that the shelter had

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[5] The government proposes to lodge with the Court under seal exhibits of non-record material. Respondent's counsel has informed the Court that it has agreed with the government that it may utilize these exhibits in this brief, and seek to lodge its own, while protecting sensitive information and individuals' confidentiality. Respondent will seek to make these materials public with appropriate redactions.

arranged for transport services this evening per your email." Pet'rs' Ex. F. Government counsel continued: "I would appreciate it if you could let me and [the Assistant U.S. Attorney (AUSA) in Texas] know when the timing for tomorrow's procedure is clarified." *Id.* Ms. Doe's attorney replied minutes later stating that she appreciated the call, and that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know." Pet. 13.

Shortly after 6:00 p.m., shelter personnel emailed HHS and DOJ personnel that Ms. Doe's attorney ad litem had informed them that "'the window for appointment this evening was missed,'" and Ms. Doe should return to the shelter. Pet'rs' Ex. E.

At 6:17 p.m., Ms. Doe's attorney emailed DOJ attorneys to say that the doctor was unable to stay that evening, and that "[t]he ad litems will arrange with the shelter to have [Ms. Doe] arrive at the clinic at 7:30 a.m." the next morning. Pet'rs' Ex. F. A few minutes later, Ms. Doe's guardian informed shelter and DOJ personnel that Ms. Doe "has an appointment tomorrow morning at 7:30 a.m." at the clinic and "must be there on time." Pet'rs' Ex. G. The shelter confirmed that it would make "necessary arrangements to ensure minor is present." Pet'rs' Ex. H.

At 8:13 p.m., another DOJ attorney emailed Ms. Doe's attorneys to say that DOJ intended to seek a stay from the Supreme Court the next morning. Resp'ts' Ex. 1. One of Ms. Doe's attorneys emailed back to thank the attorney for letting him know. *Id.*

At 9:31 p.m., Ms. Doe's guardian ad litem informed shelter and DOJ personnel that Ms. Doe's "appointment has been moved to 4:15 a.m. at the address provided." Pet'rs' Ex. K. The shelter again

confirmed receipt and indicated it had made transportation arrangements. Pet'rs' Ex. L. Shelter personnel forwarded the email to HHS personnel at 11:56 p.m. to inform them that it had "not received confirmation of what service will take place tomorrow, we were under the impression [Ms. Doe] was going in for mandated counseling, however, provided newly requested time was issued at the request of health center and attending physician, it is unclear whether [Ms. Doe] will partake in mandated counseling or undergo medical procedure." Pet'rs' Ex. M at 3.

At 4:30 a.m. on Wednesday, October 25, shelter personnel emailed HHS personnel stating that the "health center charge nurse has *confirmed* that minor is scheduled to undergo medical procedure this morning." *Id.* at 1 (emphasis added).

After 8 a.m. that morning, Ms. Doe's abortion was performed by the doctor who had originally counseled her on October 19. In response to DOJ inquiries, Ms. Doe's attorney confirmed this fact in an email at 9:00 a.m. Pet. 15.

Although the petition states that at the time Ms. Doe had her abortion the government "believed that it had identified a potentially suitable sponsor," and "believed that the process could be completed within a week," *id.* at 6, it is now more than a month later, and the government *still* has not approved a sponsor; Ms. Doe remains in ORR custody. Had it not been for court intervention, Ms. Doe would still be pregnant, against her will, today.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A LEGAL ISSUE WORTHY OF THIS COURT'S REVIEW.

Having failed to seek a timely stay, the government now asks the Court to grant review of an interlocutory order that it contends is moot. By the government's own reasoning, the underlying decision presents no merits issues on which the Court could rule, even if it were so inclined. Instead, the government asks the Court to grant review to vacate the D.C. Circuit's decision, a form of relief this Court has described as an "extraordinary remedy," *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

To succeed in this unusual plea, the government must—consistent with its own longstanding view—demonstrate that the case would have independently warranted this Court's review had it not become (in the government's view) moot. See Pet. 23 n.4. It "has been the consistent position of the United States" that "the Court should deny review of cases (or claims) that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition, when such cases (or claims) do not present any question that would independently be worthy of this Court's review." U.S. Amicus Br. at 10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31) (cert. denied); see U.S. Br. in Opp. at 5–8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900) (cert. denied); Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013) (noting that the Court appears to follow the government's approach). This rule recognizes that this Court's review is "discretionary and exercised

circumspectly," and that "there is no unfairness in leaving the lower court's decision intact" where "the Court would have denied certiorari in any event." U.S. Br. in Opp. at 12–13, *Enron Power Mktg., Inc.* v. *N. States Power Co.*, 528 U.S. 1182 (2000) (No. 99-916) (cert. denied); *id.* at 11 (agreeing that the decision below was incorrect but urging denial in light of the government's longstanding position).

The government plainly cannot meet its own test. In fact, the petition barely presents any affirmative legal *argument* that the D.C. Circuit's decision would have warranted this Court's review if the government *had* sought review on the merits. It does not directly claim—because it cannot—that the court of appeals' decision denying a stay conflicts with any other circuit's decision, or with a prior decision of this Court. See Sup. Ct. R. 10. Instead, the petition contains a single sentence that merely notes that prior decisions of this Court support the view that "the government *generally need not* facilitate abortions." Pet. 22 (emphasis added).

The lower court did *not*, however, resolve the merits of Ms. Doe's constitutional claim or the government's argument that its refusal to "facilitate" Ms. Doe's abortion did not impose an unconstitutional "undue burden" on Ms. Doe.[6] The only matter decided below—and therefore the only question the government's petition *could have* presented—was whether the government's emergency motion for a stay of the TRO pending appeal should be denied because the

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[6] Because the government did not dispute below that Ms. Doe has a constitutional right to an abortion, it does not and could not appropriately raise that issue here.

government had "not met the stringent requirements" for such relief. Pet. App. 19a.

That narrow question is manifestly unworthy of this Court's review. Indeed, the government does not claim otherwise. Nor does it raise that legal issue for this Court's consideration. See Pet. I. And for good reason. The test for a stay pending appeal is highly fact-bound and inherently individualized. See *Nken* v. *Holder*, 556 U.S. 418, 426 (2009) (court weighs multiple factors: applicant's likelihood of success on the merits, whether applicant will suffer irreparable injury, balance of hardships, and public interest).[7] The petition does not argue that the court of appeals applied the incorrect legal test. And review of the court of appeals' application of *Nken* to the facts here is plainly not the stuff of certiorari. See Sup. Ct. R. 10; c.f., U.S. Br. in Opp. at 8, *Walmer* v. *Dep't of Def.*, 516 U.S. 974 (1995) (No. 95-230) (cert. denied) (urging denial of review of preliminary injunction ruling where the only question properly presented is the application of the established standard to "case-specific" facts).

Even if the court of appeals *had* ruled on the constitutionality of the government's actions—and in merely denying a stay pending appeal it manifestly did not—such a decision would not conflict with any of the cases the government cites. In those cases, the Court found that the government's actions were constitutional because they "place[d] no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Harris* v. *McRae*, 448 U.S. 297, 314 (1980) (quoting *Maher* v. *Roe*, 432 U.S. 464, 474

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[7] In addition to being only one of several factors, *likelihood* of success on the merits is not a determination on the merits. *See Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981).

(1977)); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 509 (1989); see generally *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 876 (1992) (undue burden standard). Because Ms. Doe was (and still is) in U.S. custody, the government's refusal to permit her to attend her appointments places her in a wholly different position.

The petition does not, moreover, explain why the government has an interest in restricting access to abortions by minors in its custody, but not adults in its custody. The government does not dispute that it transports women and "arrange[s]" for abortions when they are in ICE or BOP custody.[8] Yet, in apparent conflict with these policies, the government states that any steps to provide access to an abortion give rise to the interests it asserts, even if the government were to play no role in transporting or paying for an abortion. See Appellants' Resp. to Pet. for Reh'g En Banc 11–12 (Oct. 23, 2017).[9] Indeed, in its efforts to defeat class certification, the government now represents in the ongoing district court proceedings that HHS does not have a "policy" prohibiting minors from attending abortion-related appointments and questions whether there are any other cases in which the defendants

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[8] *See* ICE, *Detention Standard 4.4, Medical Care (Women)*, at 325 (revised Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf (if an ICE detainee requests abortion, ICE "shall arrange for transportation at no cost" to the detainee); 28 C.F.R. § 551.23(c) (federal inmate may decide whether to have an abortion and, if she does, "the Clinical Director shall arrange for an abortion to take place").

[9] *See also* Pet. App. 29a (concurrence of Millett, J.) (government did not need to (1) pay for Ms. Doe's abortion, (2) transport her; (3) complete any paperwork or administrative measures (since the contractor detaining Ms. Doe advised that it was willing to do so); or (4) complete its own "best interests" form).

"have refused to release a minor in ORR care to obtain an abortion." Defs.' Opp. to Mot. for Class Certification 25 (Nov. 20, 2017).

Finally, the emergency interlocutory posture of the decision below makes it an exceedingly poor vehicle for addressing any of these issues, even if they were otherwise properly presented. This Court's review of interlocutory determinations is the exception rather than the rule. See *Va. Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of writ of certiorari). Here, the government itself argued that *en banc* review was "premature" and "inappropriate at this interlocutory stage of the case" because of the lack of a well-developed factual record given the expedited proceedings. Appellants' Resp. to Pet. for Reh'g En Banc 12–14 (Oct. 23, 2017) (focusing on claims about the sponsorship process and Ms. Doe's immigration status); see also Pet. App. 63a n.6 (Kavanaugh, J., dissenting) (factual record in this case is both "under-developed" and "still unclear and hotly contested").

In short, the petition fails to show—or even to argue in full—that the decision below warrants this Court's review.

II. MS. DOE'S CLAIMS REGARDING THE TREATMENT OF PREGNANT MINORS ARE NOT MOOT.

The only question the government presents for the Court's review is whether it should vacate the D.C. Circuit's decision and remand with instructions to dismiss *"all claims* for prospective relief regarding pregnant unaccompanied minors" on the ground that such claims were mooted by Ms. Doe's abortion. Pet. I, 19 (emphasis added). The government fails, however,

to demonstrate that *any* of the claims for prospective relief in Ms. Doe's complaint regarding the treatment of pregnant unaccompanied minors are moot. The relief it requests from this Court—vacatur of the denial of a stay pending appeal followed by dismissal of an array of claims that are still being litigated below—is therefore unwarranted.[10]

As an initial matter, Ms. Doe indisputably has live claims for injunctive relief to prevent the government from retaliating against her for her decision to have an abortion and to prevent it from disclosing information about her abortion decision to third parties. See Pet. App. 67a (amended TRO); Order (Oct. 30, 2017) (extending portions of the TRO); Compl. 16. The government appears to agree that these claims remain live. See Pet. 24 (discussing disclosure claim).[11] Ms. Doe also seeks to bring these claims on behalf of the class. Compl. 16.

In addition, Ms. Doe's claims regarding access to abortion—for which she also seeks injunctive relief, Compl. 15–16—fall into established exceptions to mootness. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) ("[p]regnancy provides a classic justification for a conclusion of nonmootness"). This is particularly the case here, where Ms. Doe brings these claims on behalf of both herself and a class of minors in HHS custody.

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[10] The government does not claim—indeed it could not—that vacatur is warranted because *the case* has become moot. Thus, even in its own view, the Court's "general practice" under *Munsingwear* would not be appropriate here. Pet. 24. Instead, it requests that this Court decide in the first instance that *certain* of Ms. Doe's claims are moot and direct their dismissal.

[11] Indeed, the government has filed a still-pending motion seeking to modify the TRO to permit it to disclose Ms. Doe's abortion. Defs.' Mot. for Recons. of the Court's October 30, 2017 Order Extending the Am. TRO (Nov. 6, 2017).

Compl. ¶¶ 55–56. Indeed, courts have recognized in the class action context that claims based on temporary conditions may continue *even if* the putative named plaintiff's claims become moot during the litigation. The government is therefore incorrect that "claims for injunctive relief" related to the putative class are moot. Pet. 25. This Court has repeatedly stated that a class action remains live in various circumstances where a motion for class certification was filed prior to the named plaintiff's claim becoming moot. See, *e.g.*, *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991) ("That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction."); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 398–99 (1980) ("named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation" when claims are "capable of repetition, yet evading review," or "inherently transitory"); *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978); *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975); *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975).

In this case, Ms. Doe moved for class certification on October 18, when she was indisputably a member of the putative class. And the primary claim on which Ms. Doe seeks to represent a class—the right to access abortion services while in U.S. custody—is the archetypal example of a claim that is both inherently transitory and "capable of repetition yet evading review." See, *e.g.*, *Roe*, 410 U.S. at 125; *Doe* v. *Bolton*, 410 U.S. 179, 187 (1973); *Doe* v. *Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975); *Ciarpaglini* v. *Norwood*, 817 F.3d 541, 547 (7th Cir. 2016) (characterizing pregnancy as an "inherently transitory" situation). In fact, the Court has

specifically cited the abortion context as an example of the type of claim that is appropriate for class-action treatment even in circumstances where the named plaintiff's claim has become moot. See *Geraghty*, 445 U.S. at 398, 416 n.9 (citing *Roe*). Here, Ms. Doe was not only pregnant but also in federal custody, "[t]he length of [which] . . . is impossible to predict." *Thorpe* v. *Dist. of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013); see also *Geraghty*, 445 U.S. at 399.

The government argues that these exceptions to class action mootness cannot apply in this case because "[w]e simply do not know whether the district court could have ruled on Ms. Doe's motion for class certification before her interest . . . otherwise would have expired." Pet. 26. But this is not the test. Instead, courts look to the uncertainty surrounding the length of the condition as a general matter. See *Geraghty*, 445 U.S. at 399 ("It is *by no means certain* that *any given individual*, named as plaintiff, would be in [custody] long enough for a district judge to certify the class." (emphasis added) (quoting *Gerstein*, 420 U.S. at 110, n.11)); *Olson* v. *Brown*, 594 F.3d 577, 582 (7th Cir. 2010) ("it is uncertain that any potential named plaintiff in the class of inmates would have a live claim long enough for a district court to certify a class").

The government's request for this Court's intervention should be rejected. Its argument that Ms. Doe's claims for prospective relief regarding pregnant unaccompanied minors have been mooted is incorrect. The litigation continues below, and there is no justification for this Court to disrupt that process by prematurely dismissing Ms. Doe's legal claims.[12]

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[12] The petition does not, moreover, cite cases where this Court has granted review in order to direct vacatur of an interlocutory ruling in such a posture.

III. VACATUR IS NOT WARRANTED.

The government's asserted rationale for vacatur is equally unpersuasive. The petition seeks to vacate the D.C. Circuit's decision to ensure that the ruling does not "spawn[] any legal consequences." Pet. 23 (quoting *United States* v. *Munsingwear*, 340 U.S. 36, 41 (1950)). Even if this rationale constituted sufficient grounds for the Court to grant discretionary review and vacate (and the government agrees it does not, *see supra* Section I), the supposed "legal consequences" are wholly illusory. No purpose would be served by the relief the government seeks. The D.C. Circuit's interlocutory stay decision controls none of the issues being litigated. If and when the courts below reach the merits and resolve the outstanding issues, the government will have a full opportunity to seek further review.

The government points to Ms. Doe's *Bivens* claims and her putative class action as matters that it fears will be "constrained" by the decision below. Pet. 23–24. That argument might carry force had the court of appeals actually resolved the merits of any issue presented in the complaint. But, as explained above, the only issue before the court of appeals, and all it decided, was whether the defendants were entitled to a stay pending appeal. Particularly given the summary nature of its order, this interlocutory ruling will not "constrain" a future court that is presented with the merits following full briefing. See 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4478.5, at 797 (2d ed. 2002) ("law of the case is not established by . . . denial of a stay . . . pending appeal"). Even rulings on preliminary injunctive relief are not controlling with respect to subsequent final determinations on the merits. See *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394–95

(1981); *Berrigan* v. *Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974). The government will be free to seek both appellate court review and this Court's review when the case reaches final judgment on the merits—which is yet another reason for denying the petition. See *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring in denial of certiorari).

At bottom, the government appears to be asking the Court for a do-over in light of its failure to seek immediate review of the court of appeals' decision. But that is a problem of its own making, and it fails to identify any reason this Court's resources should be expended reviewing the denial of an emergency stay pending appeal. Seeking an immediate stay from this Court when it was still timely to do so would have been completely consistent with the proceedings in this case.[13] Like *Munsingwear* itself, this is a case "where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself." 340 U.S. at 41. This Court should therefore decline to vacate the decision below. See *Mahoney* v. *Babbitt*, 113 F.3d 219, 221–22 (D.C. Cir. 1997) (vacatur of preliminary injunction not appropriate where government failed to seek a Supreme Court stay before the mooting event occurred the day after the injunction).

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[13] For instance, when the district court issued the initial TRO on October 18 at 3:17 p.m., the government filed a notice of appeal, a motion for a stay pending appeal, and an administrative stay by 8:20 p.m. the same day. After the *en banc* court of appeals issued its October 24 order at 1:49 p.m., respondent's counsel filed a motion for an amended TRO at 3:04 p.m.

IV. THERE IS NO BASIS FOR DISCIPLINARY ACTION AGAINST RESPONDENT'S COUNSEL.

The government's concluding suggestion that this Court "may wish to issue an order to show cause why disciplinary action should not be taken" against respondent's counsel, Pet. 26, is both extraordinary and baseless. It finds no support in the facts or the law.

The government's recitation of events shows that: (1) Ms. Doe's counsel made a series of *accurate* statements concerning the availability of, and logistics surrounding, Ms. Doe's ability to obtain an abortion; (2) some government personnel may have incorrectly *assumed* that Ms. Doe could not obtain an abortion before October 26, even though she was legally entitled to obtain an immediate abortion, and had received state-mandated counseling on October 19; (3) some government lawyers may have *believed* that Ms. Doe's counsel would advise them if facts changed; and (4) Ms. Doe's counsel did not take affirmative steps to notify the government that the doctor who provided the counseling on October 19 agreed to come back to the clinic. The government's suggestion that this might amount to sanctionable misconduct is not supported by legal authorities regarding attorney conduct, is not remotely justified by the disciplinary cases it cites,[14] and is contrary to counsel's respective ethical duties.

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[14] *E.g.*, *In re Hall*, 57 S. Ct. 107 (1936) (disbarment order related to *In re Hall*, 56 S. Ct. 86 (1935) (attorney special master abused appointment to coerce a litigant)); *In re Davis*, 289 U.S. 704 (1933) (reprimand for failure to respond to communications from the clerk regarding outstanding fees); *In re Gilbert*, 276 U.S. 294 (1928) (suspension for improperly retaining fees); *In re Moore*, 177 F. Supp. 2d 197, 1998–99 (S.D.N.Y. 2001) (explaining that *In*

In an effort to show otherwise, the government repeatedly claims that opposing counsel "represented" "that no abortion would take place until October 26," Pet. 11; see also *id.* at 13, 14, 19. Yet no such representation appears in the emails or the declaration of the AUSA lodged with the Court by the Solicitor General that the government cites. Instead, the events recited in the petition indicate that Ms. Doe's representatives stated at various times on October 24 that the physician who was available at the clinic on October 24 (who was not the physician who originally provided the state-mandated counseling) could provide a new counseling session, which would trigger a 24-hour waiting period. See 11/1/2017 AUSA Decl. ¶¶ 6–7. The government does not claim that any of these statements was false.

The government also points to statements that respondent's counsel made to the district court on October 24. The petition states that respondent's counsel represented to the court "that for Ms. Doe to obtain an abortion, she would need to complete a two-step, 24-hour process." Pet. 12. But this misrepresents counsel's filing. Counsel requested an amendment to the original TRO to make clear that its relief and the government's obligation to transport or allow Ms. Doe to be transported should be effective that very day. In support of this change, counsel noted that "a qualified

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re Disbarment of Moore, 529 U.S. 1127 (2000), involved a petition for certiorari that failed to address the merits and accused lower court of corruption)); *see also In re Shipley*, 135 S. Ct. 1589, 1589–90 (2015) (discharging show cause order regarding Supreme Court Rule 14.3 requirement that petitions for writs of certiorari be stated "in plain terms," and noting that attorneys "may not delegate that responsibility to the client"); *In re Sibley*, 63 S. Ct. 438 (1943) (discharging show cause order without identifying conduct at issue).

physician is available at the nearest clinic today, and will be available to perform the procedure tomorrow." Pl.'s Emergency Mot. to Amend the TRO 2 (Oct. 24, 2017).[15] The motion specifically noted that it sought to ensure that Ms. Doe could "obtain the abortion . . . without further delay and as *may* be required by Texas state law and the *availability of physicians*." *Id.* at 1 (emphases added). The motion thereby made clear that the TRO should enable Ms. Doe to obtain an abortion at the earliest time and from any available physician.

As this motion underscores, Ms. Doe's counsel did not represent that, in making arrangements for her to see the physician who was at the clinic on October 24, they were forswearing any effort to secure an appointment with any other doctor who might be able to provide the abortion. Indeed, the government knew—and by its own account acknowledged to Ms. Doe's representative on October 24—that the original doctor could perform the procedure without the need to repeat counseling. See 11/1/2017 AUSA Decl. ¶ 7.[16]

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[15] This statement was not only true, it provided new information; as of oral argument on October 20, there were *no* doctors scheduled to be at the clinic the week of October 23 after October 24. D.C. Cir. Oral Arg. 1:13:43–1:14:51, https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=201710&Count=37&scode=3.

[16] The AUSA's declaration states that, in response, the attorney ad litem stated she was referring to "a different doctor" who could perform the abortion on Thursday. 11/1/2017 AUSA Decl. ¶ 7. By the government's own account, this statement was entirely accurate. The declaration indicates that the attorney ad litem was talking about the doctor who was at the clinic on October 24, and the fact that new arrangements were being contemplated so that that doctor could remain at the clinic longer to provide the procedure. *See id.* ¶ 6.

It also knew that Ms. Doe's representatives were considering various logistical arrangements to ensure that a doctor would be available to provide her abortion. *Id.* ¶ 6. These facts show that the situation was fluid; Ms. Doe's representatives were considering multiple alternatives; and they were seeking to obtain Ms. Doe's long-delayed abortion as soon as possible. The government implies that it reasonably believed these alternatives did not include any effort to return the original doctor to the facility, and claims that Ms. Doe's attorney ad litem had stated that this doctor "was not available," Pet. 13. But this suggestion rests on yet another misleading paraphrase: According to the government's own declaration, the attorney ad litem stated that the original doctor "was not available *on October 24*." 11/1/2017 AUSA Decl. ¶ 6 (emphasis added). The government does not claim that the statement actually made was inaccurate, or that it was a representation that Ms. Doe's counsel would make no effort to have that doctor return to the facility on October 25.

The government also points to a telephone call and exchanges of emails on October 24 in an effort to suggest that respondent's counsel provided assurances that the government did not need to request a stay because the abortion would not occur until October 26. Specifically, the government makes much of an email exchange in which one of its lawyers said the attorney "would appreciate it if [Ms. Doe's counsel] could let me and [the AUSA] know when the timing for tomorrow's procedure is clarified," Pet'rs' Ex. F, and Ms. Doe's counsel stated that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know," Pet. 13.

The government takes this exchange entirely out of context. Less than an hour earlier, the shelter had refused to transport Ms. Doe to the clinic until it had ORR's approval, and the government had been advised that opposing counsel would "initiate contempt proceedings" if Ms. Doe was not transported to the clinic promptly. Pet'rs' Ex. C. The government attorney called respondent's counsel shortly thereafter to explain that the shelter needed advance notice to arrange transportation, and to confirm that Ms. Doe was now being transported to the clinic. See Pet. 12–13. The government attorney then sent the email that confirmed "[the attorney's] understanding that the shelter had arranged for transport services this evening per your email," and included the attorney's request for information about the timing of "tomorrow's procedure." Pet'rs' Ex. F.

In context, the email exchange merely documents the government's compliance with its obligation under the TRO to provide transportation, its commitment to do so again the following day, and counsel's agreement to let the government know when Ms. Doe needed to be at the clinic the next day to avoid any further problems with transportation.[17] Critically, the government's email does not mention any stay motion, let alone link the request to the timing of such a filing. Nor does the government claim that its attorney mentioned any stay application in the earlier call. It is now wishful thinking to argue that this exchange over

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[17] At the time of the government's email, Ms. Doe was being transported for pre-abortion counseling. The request for information about the timing of the next day's "procedure" is thus sensibly understood as no more than a request to be informed of Ms. Doe's schedule the next day so that the necessary transportation could be arranged.

transportation logistics reflects a mutual understanding that the government need not seek a stay because opposing counsel "had represented to the government that . . . no abortion would occur until the morning of October 26," Pet. 19.

The government's claim is further belied by the email exchange the government points to from later in the evening of October 24. The government asserts that, "[b]ased on the representations of counsel that no abortion would occur until October 26," it informed the Clerk's Office and respondent's counsel that it would seek a stay the morning of October 25. Pet. 14. But by the government's own account, no communication about the timing of a motion for a stay occurred until 8:13 p.m. the night of October 24 and, even then, the email the government sent informing respondent's counsel that it would seek a stay in the morning says nothing about any such representations. Resp'ts' Ex. 1. Nor does it communicate the government's "understanding" about the timing of the procedure or seek confirmation that respondent's counsel shared that understanding, much less a commitment that her counsel would promptly advise the government of any changed circumstances. *Id.* The response from one of Ms. Doe's lawyers likewise includes no such confirmation or commitment. *Id.* Indeed, one of her attorneys responded to the 8:13 p.m. email by expressing relief that he would not have to check his email for any stay motion filed later that night. That email indicates that Ms. Doe's attorneys had expected the government to seek a stay that night—an expectation wholly inconsistent with the government's suggestion that there was a mutual understanding that filing was unnecessary because Ms. Doe's counsel

has represented that the abortion would not occur until October 26.

The Solicitor General argues that these statements and events of October 24 led some government personnel to *assume* that Ms. Doe would not be able to obtain an abortion prior to October 26. See Letter from Noel J. Francisco, Solicitor General, to David D. Cole, National Legal Director, ACLU 2 (Oct. 26, 2017) (stating that it relied on representations of counsel and others and "our *resulting understanding* that no abortion procedure could then take place" until October 26) (emphasis added)). But none of the statements the government cites was a representation, much less a commitment, "that no abortion would take place until October 26," Pet. 11.

The petition describes a course of events where many different parties were communicating into the night as events unfolded rapidly. Particularly given this fluid situation, and the government's knowledge that Ms. Doe had sought throughout the litigation to obtain an abortion as soon as possible, it is striking that government counsel, by the government's own account, neither *requested* that Ms. Doe forbear from obtaining the procedure while the government sought a stay from this Court nor sought confirmation of government counsel's "understanding" that no abortion would occur prior to October 26. Absent such a commitment or confirmation, it was incumbent upon government counsel immediately to seek a stay. The government cannot now blame opposing counsel for its own failure either to act with its customary alacrity or to take any protective steps.

In short, Ms. Doe's counsel had made clear that they were attempting to help their client obtain the

abortion as soon as possible; the government knew Ms. Doe had already received counseling from the original doctor, so that if that doctor became available, the abortion could take place immediately; and according to the government's own recitation of events, it did not link its request for information about the timing of Ms. Doe's appointment on October 25 with any statement concerning the timing of a stay motion with this Court.

To suggest that respondent's counsel had a duty to forbear from effectuating the TRO on October 25 under these facts would turn counsel's ethical obligations on their head. The only reason Ms. Doe's representatives needed to talk to government personnel *at all* was to tell them the timing of Ms. Doe's appointment so that the government would not delay Ms. Doe's transportation to the clinic. If government counsel wished to ensure that they would have an opportunity to seek a stay before the abortion procedure, they could and should have requested such an assurance from respondent's counsel and, if they did not receive a sufficiently clear commitment, they could and should have immediately sought relief from this Court. They inexplicably failed to take these reasonable steps, and cannot now blame respondent's counsel for the consequences of their own inaction.

In addition to failing to supply a factual basis for its extraordinary request, the government fails to supply a specific legal rationale or cite to any legal authority that supports its position. The petition vaguely refers to "what appear to be material misrepresentations and omissions" by respondent's counsel, Pet. 26, a claim that, if true, would violate ethical rules. See ABA, *Model Rules of Professional Conduct* R. 3.3 (2016) (prohibiting knowingly false statement of fact to a tribunal); *id.* R. 4.1(a) (barring "a false statement of

material fact or law to a third person"); *id.* R. 4.1 cmt. 1 (misrepresentations). But the government identifies no misrepresentations and fails to explain how counsels' statements and/or actions would have amounted to false statements. The petition says that respondent's counsel "arguably" had an obligation to notify the government that Ms. Doe's original physician had become available on the morning of October 25. Pet. 28. Yet the petition cites to no rule of ethics, case law, or other authority to support such an obligation. Indeed, no such obligation exists—and for sensible reasons. A lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," except "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." ABA, *supra*, R. 4.1 & cmt. 1; see *id.* cmt. 3. A lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law," *id.* pmbl., and violates that duty "when he or she . . . fails to take the necessary steps to preserve the client's interests," *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998), or to maintain client confidentiality, see *In re Gonzalez*, 773 A.2d 1026, 1030–31 (D.C. 2001).[18] The events the government recites show that Ms. Doe's counsel acted in their client's best interests, which is precisely what counsel are supposed to do. The government's extraordinary

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[18] Far from requiring Ms. Doe's counsel to apprise the government of the details of Ms. Doe's medical appointments, ethics rules would have precluded them from agreeing to do so if it would undermine her interests. *See* David Luban, *DOJ's Stance on Illegal Immigrant Abortion Case is Clear Jab at ACLU*, The Hill (Nov. 9, 2017), http://thehill.com/opinion/healthcare/359617-dojs-stance-on-illegal-immigrant-abortion-case-is-clear-jab-at-aclu.

request that the Court consider disciplinary action should be rejected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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